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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 215.

THE CITY AND COUNTY OF SAN FRANCISCO, AND J. S. DYER, Plaintiffs in Error,

vs.

JANE SCOTT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JANUARY 8, 1881.

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1 In the Supreme Court of the State of California.

Appeal from the District Court of the Fourth Judicial District.

Amended Complaint.

JANE SCOTT
vs.
JAMES S. DYER AND THE CITY AND COUNTY OF SAN FRANCISCO.
} No. 21563.

The above-named plaintiff, for an amended complaint, complains of above-named defendants, and for a cause of action shows:

1st. That on the 23d day of September, 1848, the Pueblo or town of San Francisco, by and through its alcalde, Thaddeus M. Leavenworth, made in form a grant, or asserted grant, to A. C. Harris, a lot of ground one hundred varas square, known as lot number 11 of the Laguna survey, in the present city and county of San Francisco, and that the title so acquired by said Harris is now vested in the plaintiff, who by herself, her tenants, and those under whom she claims, has been and is now in the actual and undisputed possession thereof, and of every part thereof, since the date of said grant.

2 2d. That in the year 1856, or thereabouts, the city and county of San Francisco made an order by which it adopted a plan or map establishing streets in that portion of the then incorporated limits of said city of San Francisco lying west of Larkin street and southwest of Johnson street, and that in and by said plan or map, a street called Green street was located and established thereon.

3d. That from said year 1856 until the present year no attempt or effort was made by said city and county to open said Green street, or in any manner to improve the same.

4th. That lately, in this present year 1877, the said city and county passed an order for the grading of said Green street from Polk street to Gough street, and awarded a contract to grade such street to one J. Brock, and thereupon, and within the time allowed by law after such award, the superintendent of public streets, highways, and squares of said city and county contracted with Harriet S. McElroy, R. Thompson, E. W. Burr, E. F. Northam, J. W. Wesson, E. Brown, and W. Buckley, claiming to be owners of a majority of the frontage of lots liable to be assessed for said work, who elected to do said work, and entered into a contract to do the same at the price for which said work was awarded to said
3 Brock, that said contract was in writing, and was made between them and said superintendent of public streets, highways, and squares, on the 13th day of August, 1877, and thereupon the said McElroy, Thompson, Burr, Northam, Wesson, Brown, and Buckley assigned and transferred said contract to the defendant Dyer, on said 13th day of August, 1877.

5th. That said Green street, as located and established on said plan or map, and as so ordered to be graded, passes through the plaintiff's said lot of ground.

6th. That plaintiff has never consented to the location or establishment of said Green street on said plan or map, or to the opening or grading thereof through or over her said lot; on the contrary, she has always opposed and still opposes the same, because she alleges that she has never been compensated by said city and county for the land proposed to be taken from her by said city and county for said Green street, and because no steps of any kind have ever been had by or on behalf of said city and county condemning plaintiff's said land for the purpose of opening said street.

7th. That the defendant Dyer claiming the right to do so under said order of said city and county, and the contract so made with
said superintendent of public streets, highways, and squares,
4 and assigned to him by said property owners, threatens to
enter upon plaintiff's said lot, and to grade said Green street
as far as it is located upon and over said lot, and will do so unless he be prevented and hindered by the order of this court, and that if he be permitted so to do his acts will be in violation of plaintiff's vested right to hold her said lot of ground, and every part thereof, until due compensation shall have been made to her according to law, for so much thereof as may be taken for the purpose of opening said Green street through her said lot.

Wherefore, she prays that the said orders of said city and county of San Francisco, ordering the grading of said Green street, between Polk and Gough streets, and awarding the contract for the same to said Brock, and the contract so entered into between said superintendent of public streets, highways, and squares, and said property owners, and so assigned as aforesaid to the defendant Dyer, may be adjudged void and of no effect whatever so far as the same affect the said lot so owned by the plaintiff, and that the defendant Dyer, and all persons acting for or under him, may be forever enjoined and prevented from grading, and attempting to grade said Green
street through or over or upon her said lot, under or by
5 virtue of any of said orders, or of said contract, and for such
other and further relief as may be just and proper.

SIDNEY V. SMITH & SON,
Plff's Att'ys.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

Jane Scott, being duly sworn says, that she is the plaintiff in the above-entitled action; that she has read the foregoing complaint, and knows the contents thereof, and that the same is true, of her own knowledge, except as to the matters which are therein stated on her information or belief, and as to those matters, that she believes it to be true.

JANE SCOTT.

Sworn to before me this 7th day of Sept. 1877,
[SEAL.] HOLLAND SMITH, *Notary Public.*

It is hereby agreed that the within amended complaint may be filed in the within entitled action, and that the order to show cause heretofore entered, may stand as if made upon the amended complaint, and that the answer of defendant, Dyer, now on file, may stand as his answer to this amended complaint at the option of defendant.

Sept. 10th, 1877.

J. M. WOOD, *Def't's Att'y.*

6 I merely consent to the filing of this amended complaint.

W. C. BURNETT,
Att'y for the C. & Co., of San Francisco.

Service of a copy of this amended complaint is hereby admitted, Sept. 10th, 1877.

WOOD, *Def't's Att'y.*
W. C. BURNETT,
Att'y for the City and County of San Francisco.

[Endorsed.]

Filed September 10th, 1877.

THOS. H. REYNOLDS, *Clerk.*
CHAS. W. O'NEILL, *Dep. Cl'k.*

Order to show cause.

Title of Court and Cause.

On reading the complaint filed in the above action, and on motion of Sidney V. Smith & Son, attorneys for plaintiff, it is ordered that the defendant, James S. Dyer, show cause before the court on Friday next, the 31st day of August, 1877, at the opening of the court on that day, or as soon thereafter as counsel can be heard, why an injunction should not issue against him to restrain
7 him from grading, or attempting to grade, Green street
through, or over, or upon the lot of ground in the city and county of San Francisco, known as 100 vara lot number 11, of the Laguna survey, owned by plaintiff, and which lot lies between Polk and Gough streets; and it is further ordered that, in the meantime, the said James S. Dyer, be and he is hereby restrained from grading, or attempting to grade said Green street over, through, or upon plaintiff's said lot.

R. F. MORRISON, *Judge.*

Dated August 27th, 1877.

[Endorsed.]

Filed August 30th, 1877.

THOS. H. REYNOLDS, *Clerk.*
CHAS. W. O'NEILL, *Deputy.*

Answer of Defendant Dyer.

Title of Court and Cause.

Defendant Dyer, for answer to the complaint herein, denies that ever at any time, and particularly during any part of the year 1848, was Thaddeus M. Leavenworth, or any other person or corporation whatever, either authorized or empowered to grant the land in the complaint described, or any part thereof, to said A. C. Harris or to any one else. Denies that the defendant, the City and County of
San Francisco, ever awarded any contract to this defendant
8 to grade the portion of Green street in the complaint mentioned.
Denies that this defendant ever entered into any contract with the said Superintendent of Public Streets to do said grading, but defendant avers:

That heretofore, to wit: On the first day of May, 1872, said Green street, from the east line of Polk street to Gough street, in the city and county of San Francisco, was and had been before that time declared to be, and since then has been an open, public, main street, dedicated to public use and laid down upon a map in the office of the City and County Surveyor of said city and county, made official by the Board of Supervisors of said city and county, as per Order No. 966, made October 25th, 1870. That the width and grade of said portion of Green street were duly established by law on and before the first day of May, 1872. That on the 17th day of June, 1877, said Green street had been graded for a distance of two blocks on either side of the aforementioned portion thereof, and on the 18th day of June, 1877, said Superintendent of Public Streets recommended to said Board that the work hereinafter mentioned should be done.

That on the 18th day of June, 1877, the said Board of Supervisors
adopted a resolution whereby said Board resolved that
9 it was their intention to order the following described work
in said city and county to be done, to wit, that Green street, from the east line of Polk street to Gough street, be graded.

That said resolution was, by order of said board, signed by the clerk of said board, and published for ten successive days (Sundays and non-judicial days excepted) in each of the following-named papers, to wit, in the "Daily Examiner," commencing on the 20th day of June, 1877; in the "Daily Evening Bulletin," commencing on the 19th day of June, 1877, and in the "Daily Alta California[n]," commencing on the 19th day of June, 1877.

That afterwards, on the 9th day of July, 1877, a resolution ordering said work to be done was adopted and passed by said Board of Supervisors.

That afterwards, on the 21st day of July, 1877, the clerk of said Board of Supervisors caused full and due notice of the nature and character of said work to be done, with specifications in detail, and specifying the time within which said work was to be performed, to be conspicuously posted and kept posted in the office of Superin-

tendent of Public Streets, Highways, and Squares of said city and county, for five successive days, and to be published for five successive days, (Sundays and non-judicial days excepted,) commencing on the said last-named day, in the aforesaid "Daily Exami-
10 ner," inviting sealed proposals for doing said work; which
said specifications were before that furnished by said superintendent.

That on and before the 28th day of July, 1877, various sealed proposals were delivered to the clerk of said Board of Supervisors to do said work; that one J. Brock delivered to said clerk one of the said sealed proposals by which he, Brock, proposed and offered to do said work fully, in all respects, as required by the said specifications, at the following prices, to wit: For grading, 9.99 cents per cubic yard.

That said proposal of said Brock was accompanied with a certified check on a banking house in said city and county for the sum of $500, gold coin, payable at sight to the order of the clerk of said board, and was approved by said clerk.

That afterwards, to wit, on the 6th day of August, 1877, said board, in open session, opened and examined all said proposals, and publicly declared the same, and then and there duly awarded the said work, and the contract for doing said work, to said Brock, who was the lowest responsible bidder therefor, at the price stated aforesaid.

That afterwards, to wit, on the 8th day of August, 1877, due notice of said award to said Brock, and of the particulars
11 thereof, was, by order of said board, published, and there-
after continued in the aforesaid "Daily Examiner" for three consecutive days, Sundays and non-judicial days excepted.

That afterwards, to wit, on the 13th day of August, 1877, the said superintendent, at said city and county, in his official character, in pursuance of said award, entered into a certain contract, with specifications thereto attached, and forming a part thereof, with the owners of a majority of the frontage of the lots and lands liable to be assessed for said work, who made oath that they were such owners, whereby and wherein said owners agreed that they would do and perform by themselves, or persons in their employ, in a good and workmanlike manner, and with such materials as should be required by said superintendent to be furnished by the said owners, all the aforesaid mentioned work, according to said contract and specifications, at the price stated aforesaid.

That the said owners, at the time of entering into said contract, elected to do said work, and gave a bond, payable to the city and county of San Francisco, in the sum of $1,000, with two good and sufficient sureties, which sureties justified, each for himself, in double the amount in said bonds specified, over and above
12 all statutory exemptions, before a deputy of said superin-
tendent, conditioned for the faithful performance of said contract, which said sum was deemed adequate by said superin-

tendent, and also a bond payable to said city and county, in the further sum of $500, with two good and sufficient sureties, who were freeholders of said city and county, and who justified, each for himself, in double the amount in said bond specified, before said deputy, conditioned that in case of the non-fulfillment of said contract, said sum should be sued for and collected as liquidated damages to said city and county for such failure and neglect, and such bonds were duly accepted by said superintendent, and placed on file in his office. That before signing said contract, said superintendent collected from said owners the sum of $3.

That thereupon said superintendent caused the said contract to be recorded in the office of the recorder of said city and county. That on, to wit, the 8th day of August, 1877, said owners so contracting sold and assigned their said contract to this defendant.

Defendant further denies that the said grading is, or will be, in vio-
lation of any of plaintiff's rights in the premises, and denies
13 that she has any right to hold, occupy, or possess any portion
of said street, or to interfere in any manner with the grading
thereof.

Wherefore defendant prays judgment that plaintiff do take nothing by this action, and for his costs.

J. M. WOOD,
Attorney for Def't Dyer.

[Jurat.]

[Endorsed.]

Rec'd copy this 30th day of Aug., 1877.

SIDNEY V. SMITH & SON,
Pl't'ff's Att'ys.

Filed August 30th, 1877.

THOS. H. REYNODS, *Clerk.*
CHAS. W. O'NEILL, *Deputy.*

Answer of the Defendant The City and County of San Francisco.

In the District Court of the Fourth Judicial District of the State of California in and for the City and County of San Francisco.

JANE SCOTT, Plaintiff,
vs.
JAMES S. DYER AND THE CITY AND COUNTY OF SAN FRANCISCO, Defendants.
No. 21563.

14 The City and County of San Francisco, one of the defendants in the above-entitled cause, comes and makes her separate answer to the amended complaint therein; denies that on the 23d day of September, 1848, or at any other time, the pueblo or town of San Francisco, by and through its alcalde, Thaddeus M. Leavenworth, or in any manner duly granted, or granted at all, to A. C. Harris a lot of ground, one hundred varas square, known as lot number 11 of the Laguna survey, in the present city and county of San Francisco, but admits and alleges that said Leavenworth,

alcalde, did, at the date mentioned in such amended complaint, make a form of grant of said lot to and in favor of said Harris, but that the same never became perfected as a grant until the 11th day of March, 1858, and then only by virtue of an act of the Legislature of this State, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," approved March 11th, 1858, and the ordinances and order therein mentioned and set forth, and subject to the confirmation of the plan and map therein mentioned, and the location of Green street, mentioned in said amended complaint, and other streets, according to said plan, and as laid down and delineated
15 upon said map, and to the opening of said streets, without making compensation to possessors for the lands covered by the roadway thereof; that said Green street, as mentioned in said amended complaint, is one of the streets laid down and delineated upon said map, and throughout its length and breadth has been, ever since the day last aforesaid, a public street of the city and county of San Francisco; that said Green street, for upwards of five (5) years last past, has been, and is, an open public street for all the purposes of a public street.

Denies that from said year 1856, until the present year no attempt or effort was made by said city and county to open said Green street, or that during that time there was no effort or attempt made by said city or county to in any manner improve the same.

Denies, according to information and belief, that the plaintiff has never consented to the location or establishment of said Green street on said plan or map, or that she has never consented to the opening or grading thereof through or over said lot, or that she has ever opposed the same, or now opposes the same, otherwise than by prosecuting this suit, and denies that no steps have ever been taken or had by or on behalf of said city and county for the purpose of opening said street.

16 Denies that said plaintiff has ever acquired, or now has any right, title, or interest of, in, or to any part of said lot within the lines of said Green street, alleges that the Board of Supervisors of this defendant acquired and had jurisdiction to order the grading mentioned in the amended complaint, and the superintendent of public streets, highways, and squares, to enter into contract therefor in said year 1877, and said work was duly ordered.

Denies that if defendant Dyer, or any other person be permitted to enter upon said lot and to grade said Green street so far as it is located upon and over said lot, his acts in so doing will be in violation of plaintiff's vested right to hold her said lot of ground, and every part thereof, until due compensation shall have been made to her according to law for so much thereof as may be taken for the purpose of opening said Green street, through her said lot, or that she has, or has ever had, any such supposed vested right, or right to compensation at all, or that she, the plaintiff, will be by such grading injured in any way, or to any value whatever.

Wherefore this defendant asks that the prayer of the complaint be denied, and judgment against plaintiff for costs.

W. C. BURNETT,
17 *Att'y for the Defendant*
The City and County of San Francisco.

STATE OF CALIFORNIA,
City and County of San Franeisco, } *ss:*

Andrew J. Bryant being duly sworn, deposes and says, that he is the mayor of the City and County of San Francisco, one of the defendants in the action wherein the foregoing answer is entitled, that he has heard read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters, he believes the same to be true.

A. J. BRYANT.

Subscribed and sworn to before me, this 17th day of September A. D. 1877.

J. D. RUGGLES,
Deputy County Clerk.

[Endorsed.]

I admit due service of the within, at San Francisco, this 17th day of September, A. D. 1877.

SIDNEY V. SMITH & SON,
Att'ys for Plaintiff.

Filed Sept. 17th, 1877.

THOS. H. REYNOLDS, *Clerk.*
By CHAS. W. O'NEILL, *Deputy Clerk.*

18 In the District Court of the Fourth Judicial District of the State of California in and for the City and County of San Francisco.

JANE SCOTT, Plaintiff,
vs.
J. S. DYER *et al.*, Defendants. } No. 21536.

Findings.

Said cause came on regularly for trial, and upon the testimony taken and the admissions of the pleadings, the court finds the following facts:

1.

That on the 23d day of September, 1848, and after the conquest of California by the United States, and after the authority of the United States had become the paramount authority of the land, one Thaddeus M. Leavenworth, the alcade of the Pueblo of San Francisco, made in form an asserted grant of the land in the complaint described to one A. C. Harris, which grant was in the usual form of alcade grants, and was made after a compliance with the then customary formalities.

2.

That whatever title Harris so acquired is now vested in
19 the plaintiff herein, who is now in the actual possession
thereof. That ever since September 23d, 1848, the said Harris and his grantees have been in the actual possession of said land, claiming to own the same in fee simple.

3.

That in the year 1856 the city and county of San Francisco made an order by which it adopted a plan or map establishing streets in that portion of the then incorporated limits of said city lying west of Larkin street and southwest of Johnston street; and that in and by said plan or map a street called Green street was located and established across and over the land in the complaint described, which plan or map is the same plan or map mentioned and referred to in the act of the legislature of said State, entitled "An act concerning the city and county of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," approved March 11, 1858.

4.

That the Board of Supervisors of said city and county, by Order No. 966, adopted October 25th, 1870, declared all the streets shown on said plan to be open, public streets, and prior to the year 1877
no attempt by said city and county to open said streets, or to
20 grade or otherwise improve the same across or over said land,
had been made, other than herein set forth.

5.

That on the first day of May, 1872, said portion of Green street, from the east line of Polk street to Gough street, was and had been before that time laid down upon a map in the office of the city and county surveyor of said city and county, made official by the Board of Supervisors of said city and county, as per Order No. 966, made October 25th, 1870. That the width and grade of said portion of Green street were established by law on and before the first day of May, 1872. That said portion of Green street crosses the land described in the complaint.

6.

That on the 17th day of June, 1877, said Green street had been graded for a distance of two blocks on either side of the aforementioned portion thereof, and on the 18th day of June, 1877, superintendent of public streets of said city and county recommended to said Board that the work hereinafter mentioned should be done.

7.

That on the 18th day of June, 1877, the said Board of Supervisors
adopted a resolution whereby said Board resolved that it was
21 their intention to order the following described work in said
city and county to be done, to wit: That Green street, from
the east line of Polk street to Gough street, be graded.

8.

That said resolution was, by order of said board, signed by the clerk of said board, and published for ten successive days, (Sundays and non-judicial days excepted,) in each of the following named newspapers, to wit: in the "Daily Examiner," commencing on the 20th day of June, 1877; in the "Daily Evening Bulletin," commencing on the 19th day of June, 1877, and in the "Daily Alta California[n]," commencing on the 19th day of June, 1877.

9.

That afterwards, on the 9th day of July, 1877, a resolution ordering said work to be done, was adopted and passed by said Board of Supervisors.

10.

That afterwards, on the 21st day of July, 1877, the clerk of said
Board of Supervisors caused full notice of the nature and character
of said work to be done, with specifications in detail, and specifying
the time within which said work was to be performed, to be con-
spiciously posted and kept posted in the office of the super-
22 intendent of public streets, highways, and squares of said city
and county for five successive days, and to be published for
five successive days, (Sundays and non-judicial days excepted,) commencing on the said last-named day, in the aforesaid "Daily Examiner," inviting sealed proposals for doing said work, which said specifications were before that furnished by said superintendent.

11.

That on and before the 28th day of July, 1877, various sealed proposals were delivered to the clerk of said Board of Supervisors to do said work; that one J. Brock delivered to said clerk one of the said sealed proposals by which he, Brock, proposed and offered to do said work fully, in all respects, as required by the said specifications, at the following prices, to wit: for grading, 9.99 cents per cubic yard.

12.

That said proposal of said Brock was accompanied with a certified check on a banking house in said city and county, for the sum of $500 gold coin, payable at sight to the order of the clerk of said board, and was approved by said clerk.

13.

That afterwards, to wit: on the 6th day of August, 1877, said board, in open session, opened and examined all said proposals, and publicly declared the same, and then and there duly 23 awarded the said work, and the contract for doing said work to said Brock, who was the lowest responsible bidder therefor, at the price stated aforesaid.

14.

That afterwards, to wit, on the 8th day of August, 1877, due notice of said award to said Brock, and of the particulars thereof was, by order of said board published, and thereafter continued in the aforesaid "Daily Examiner" for three consecutive days, (Sundays and non-judicial days excepted.)

15.

That afterwards, to wit, on the 13th day of August, 1877, the said superintendent, at said city and county, in his official character, in pursuance of said award, entered into a certain written contract with specifications thereto attached, and forming a part thereof with the owners of the majority of the frontage of the lots and lands liable to be assessed for said work, who made oath that they were such owners, whereby and wherein the said owners agreed that they would do and perform by themselves, or persons in their employ, in a good and workmanlike manner, and with such materials as should be required by said superintendent to be furnished by the said owners all the aforesaid mentioned work, according to said contract and specifications at the price 24 stated aforesaid.

16.

That the said owners, at the time of entering into said contract, elected to do said work, and gave a bond payable to the city and county of San Francisco in the sum of $1,000, with two good and sufficient sureties, which sureties justified each for himself in double the amount in said bonds specified, over and above all statutory exemptions before a deputy of said superintendent, conditioned for the faithful performance of said contract, which said sum was deemed adequate by said superintendent, and also a bond payable to said city and county in the further sum of $500 with two good and sufficient sureties, who were free-holders of said city and county, and who justified each for himself in double the amount in said bond specified before said deputy, conditioned that in case of the non-fulfilment of said contract, said sum should be sued for and collected as liquidated damages to said city and county for such failure and neglect, and such bonds were duly accepted by said superintendent, and placed on file in his office; that before signing said contract, said superintendent collected from said owners the sum of $3.00.

17.

That thereupon said superintendent caused the said con-
25 tract to be recorded in the office of the recorder of said city
and county; that on, to wit, the 8th day of August, 1877,
said owners so contracting sold and assigned their contract to the defendant Dyer.

18.

That plaintiff has never consented to the location or establishment of said Green street on said plan or map, or to the opening or grading thereof through or over her said lot; on the contrary, she has always opposed and still opposes the same, because she alleges that she has never been compensated by said city and county for the land proposed to be taken from her by said city and county for said Green street, and because no steps of any kind have ever been had by or on behalf of said city and county condemning plaintiff's said land for the purpose of opening said street.

19.

That the defendant Dyer, claiming the right to do so under said order of said city any county, and the contract so made with said superintendent of public streets, highways, and squares, and assigned to him by said property owners, threatens to enter upon plaintiff's said lot and to grade said Green street so far as it is located
upon and over said lot, and will do so unless he be prevented
26 and hindered by the order of this court, and as conclusions
of law.

I.

That said plaintiff is the lawful owner of the land in the complaint described under the aforesaid alcalde's grant, and that if said defendants or either of them be permitted to enter thereon to grade said portion of Green street, their acts would be in violation of plaintiff's vested right to hold her said lot of ground and every part thereof until due compensation shall have been made to her according to law for so much thereof as may be taken for the purpose of opening said Green street through her said lot.

II.

That plaintiff is entitled to the relief in her complaint demanded. Let judgment be entered accordingly.

R. F. MORRISON,
District Judge.

[Endorsed.]

Filed Dec. 19, 1877. *Nunc pro tunc* as of October 11th, 1877.
THOMAS H. REYNOLDS, *Clerk.*
By JOHN F. BODIN, *D. C.*

27 *Decision of the Court and Decree.*

Fourth District Court of the City and County of San Francisco, State of California.

JANE SCOTT *vs.* JAMES S. DYER *et al.*

This cause having come on this day to be tried by the court, a jury having been expressly waived by the parties, and the cause being submitted to the court in accordance with a stipulation filed herein, and the court having heard the arguments of counsel, it is ordered, adjudged, and decreed that the orders made by the Board of Supervisors of said city and county mentioned in the amended complaint, for the grading of Green street between Polk and Gough streets, in said city and county, and awarding the contract for the same to one Brock, and the contract mentioned in the complaint entered into between the superintendent of public streets, highways, and squares of said city and county, and certain property owners mentioned in the complaint for such grading, are void and of no effect whatever so far as they affect lot number eleven of the Laguna survey of said city and county, and confer no authority upon said property owners, nor upon the defendant, Dyer, nor upon 28 any other person nor persons whomsoever, to enter into or upon any part of said lot, nor to grade said Green street through or over the same; and that the defendants, and each of them and their and each of their agents, officers, and servants, and all persons acting under them, or any of them, be and they are hereby enjoined and restrained forever from grading or opening, or attempting to grade or open, said Green street through said lot or any portion thereof.

Dated October 5th, 1877.

R. F. MORRISON,
District Judge.

Recorded October 12th, 1877. Book N, page 353.
Endorsed: Filed October 12th, 1877.

THOS. H. REYNOLDS, *Clerk.*
WM. LEDDLIE, *Deputy Clerk.*

Defendant Dyer's Notice of Intention to Move for a New Trial.

Title of Court and Cause.

To Sidney V. Smith & Son, (plaintiff's attorneys,) and to the clerk of said court.

GENTLEMEN: Please take notice that said defendant Dyer intends to and will move said court for a new trial to be had in said cause upon each and every one of the following grounds:

1. Irregularity in the proceedings of the court by which said 29 defendant was prevented from having a fair trial.

2. Accident which ordinary prudence could not have guarded against.

3. Surprise which ordinary prudence could not have guarded against.

4. Abuse of the discretion of said court, by which said defendant was prevented from having a fair trial.

5. Newly discovered evidence, material for said defendant, which he could not, with reasonable diligence, have discovered or produced at the trial.

6. Insufficiency of the evidence to justify the decision of the court in said cause.

7. Errors in law occurring at the trial, and excepted to by said defendant.

8. That said decision is against the evidence.

9. That said decision is against law.

Said motion will be made upon affidavits, and a bill of exceptions now on file and statement of the case to be hereafter prepared and settled according to law and the practice of the court, and will be made to said court, at the court-room thereof, in said city and county, at the earliest practicable period after the preparation, settlement, and filing of said statement, bill of exceptions and affidavits consistent with the law and the practice of said court.

J. M. WOOD,
Attorney for Defendant Dyer.

30 [Endorsed.]

Received a copy of the within, this 18th day of October, 1872.

SIDNEY V. SMITH & SON,
Plaintiff's Attorneys.

Filed October 18th, 1877.

THOS. H. REYNOLDS, *Clerk.*
CHAS. W. O'NEILL, *Deputy.*

Defendant The City and County of San Francisco's Notice of Intention to Move for a New Trial.

Title of Court and Cause.

You will please take notice that the defendant the City and County of San Francisco will move for a new trial in the above-entitled action. Said motion will be made upon a bill of exceptions, and also upon a statement of the case, upon the following grounds, viz:

1. That the evidence is insufficient to justify the decision of the court.

2. That said decision is against law.

3. Errors in law, occurring at the trial and excepted to by the defendant, the City and County of San Francisco.

W. C. BURNETT,
Attorney for Defendant The City and County of San Francisco.

To Messrs. S. V. SMITH & SON,
Attorneys for Plaintiff.

31 [Endorsed.]

I admit due service of the within at San Francisco, this 11th day of October, A. D. 1877.

SIDNEY V. SMITH & SON,
Attorneys for Plaintiff.

Filed October 11th, 1877.

THOS. H. REYNOLDS, *Clerk.*
By WM. LEDLIE, *Deputy Clerk.*

Bill of Exceptions.

Title of Court and Cause.

Be it remembered that said cause came on regularly to be heard by said court on the 5th day of October, 1877. Whereupon the amended complaint on file herein was further amended, by consent of all the parties, and it was agreed between the parties that the answers on file should stand as the answer to said amended complaint, and the said cause was, after argument by the several parties thereto, said plaintiff being represented by Messrs. Sidney V. Smith and Son, and said defendants by J. M. Wood, Esq., and W. C. Burnett, Esq., submitted to said court for its judgment and decision upon the pleadings therein, the stipulation of the parties in the following words:

Title of Court and Cause.

Stipulated that the only points in controversy in said action are the following:

32 1. Whether, after the conquest and acquisition of California by the United States, and before the incorporation of the city of San Francisco, and before the adoption of the constitution of the State of California, a person exercising the functions of an alcalde of the Pueblo of San Francisco, otherwise Yerba Buena, could make a valid grant of Pueblo lands, as such officers had been before such conquest accustomed to do.

2. Whether such grant, if valid, operated to deprive said pueblo or its successors, the city of San Francisco, of the right to open and lay out necessary streets and highways over such previously granted land, without compensation to the holders of such alcade grants for the land actually taken for such streets.

3. What was the effect of the Van Ness Ordinance, and the proceedings had thereunder, and the acts of the Legislature and of Congress confirming them as to such streets laid out over such lands so granted, and designated as streets on said Van Ness map, and the following evidence, to wit, Order No. 697 of the Board of Supervisors of said city and county, approved May 4th, 1866, Section 23 of Chapter IV, of which order is as follows:

Sec. 23. All the original streets now laid down upon the official

map of this city and county west of Larkin and southwest of
33 Ninth streets, in accordance with the conditions of the ordinance of the common council of said city, approved June 20th, 1855, entitled "An ordinance for the settlement and quieting of land titles, 'are hereby declared to be open public streets and highways,'" which was all the evidence.

Whereupon said court ordered judgment in favor of plaintiff and against said defendants, to which order defendants then and there duly excepted, on the ground that the same was not supported by the evidence, and on the further ground that said decision was against the evidence, and on the further ground that said decision was against law, and on the further ground that said evidence was insufficient to justify said decision; and for that the decision should have been in favor of the defendants upon the facts admitted by the pleadings, the stipulation of the parties, and the evidence taken herein, instead of in favor of the plaintiff; and in order now that the defendants, being entitled thereto, may have their exceptions to the ruling and decision of the court herein made a part of the record herein, the judge of said court hereby certifies to and settles and allows this bill of exceptions this 10th day of October, 1877.

R. F. MORRISON,
District Judge.

[Endorsed.]

34 Filed October 10th, 1877.
THOS. H. REYNOLDS, *Clerk.*
By CHAS. W. O'NEILL, *Deputy Clerk.*

Order Refusing Defendant's Motion for a New Trial.

Title of Court and Cause.

In this cause, after hearing counsel for the respective parties hereto, it is ordered by the court that the motion on behalf of the defendants for a new trial herein be, and the same is hereby, denied.

Book of Minutes "R," page 249.

Defendant's Notice of Appeal.

Title of Court and Cause.

You will please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of this State from the judgment therein rendered on the 5th day of October, 1877, and in said 4th district court, and therein entered in the said district court on the 12th day of October, 1877, in favor of the plaintiff in said action, and against said defendants, and from the whole thereof, and also from the order therein made and entered in said cause, refusing said defendants' motion for a new trial, on the 7th day of December, A. D. 1877.

35 Dated this 8th day of December, 1877.

Yours, etc.,
W. C. BURNETT,
Attorney for the Defendant,
The City and County of San Francisco.
J. M. WOOD,
Attorney for Defendant, J. S. Dyer.

To the Clerk of said District Court and Sidney V. Smith & Son, Attorneys for Plaintiff.

[Endorsed.]

Filed December 8th, 1877.
THOS. H. REYNOLDS, *Clerk.*
By CHAS. W. O'NEILL,
Deputy Clerk.

Service and receipt of a copy hereof admitted, after filing, this 8th day of December, 1877.
S. V. SMITH & SON,
By C. SOMERS,
Attorneys for Plaintiff.

Certificate.

Title of Court and Cause, No. 21563.

I, Thos. H. Reynolds, county clerk of the city and county of San Francisco, and ex-officio clerk of the district court of the 4th judicial district of the State of California in and for the said city and county, hereby certify that I have compared the foregoing 36 transcript with the original papers in the above-entitled action, now on file in my office, and with orders therein made and entered on the minutes of said court, and that the said transcript is correct.

I further certify that a sufficient undertaking on appeal, in due form of law, on the part of def't, James S. Dyer, was, on the 13th day of December, A. D. 1877, filed in said cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said district court, this twenty-second day of December, A. D. 1877.

[SEAL.]
THOS. H. REYNOLDS, *Clerk.*
By H. W. KIND, *Deputy Clerk.*

Service accepted by copy this 22d day of December, 1877.
SIDNEY V. SMITH & SON,
Atty's for Respondent.

[Endorsed.]

Filed Dec. 22d, 1877.

D. B. WOOLF,
Clerk of Supreme Court.
By H. P. BUSH,
Deputy Clerk.

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the transcript on appeal to this court in the case of Jane Scott, respondent, *vs.* James S. Dyer and the City and County of San Francisco, appellants, No. 5909, as shown by the records of my office.

Witness my hand and the seal of the court, this 30th day of September, A. D. 1880.

[SEAL.] FRANK W. GROSS, *Clerk.*

37 In the Supreme Court of the State of California, Department No. 1.

Judgment.

JANE SCOTT, Respondent, *vs.* JAMES S. DYER, and the CITY AND COUNTY OF SAN FRANCISCO, Appellants.	No. 5909.

APRIL 27*th*, 1880.

On appeal from the superior court of the city and county of San Francisco, late the district court of the 4th judicial district, in and for the city and county of San Francisco:

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by McKinstry, J; Ross, J; McKee, J, concurring.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here, that the judgment and order of the district court of the 4th judicial district in and for the city and county of San Francisco in the above-entitled cause, be and the same is
38 hereby affirmed with costs.

Remittitur issued April 27th 1880.

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the judgment of this court, in the case of Jane Scott, respondent, *vs.* James S. Dyer and the City and County of San Francisco, appellants, No. 5909, as shown by the records of my office.

Witness my hand and the seal of the court, this 30th day of September, A. D. 1880.

[SEAL] FRANK W. GROSS, *Clerk.*

39 Department No. 1.

Opinion. Filed March 26th, 1880.

SCOTT *vs.* DYER *et al.* } No. 5909.

The plaintiff claims title to the lands described in the complaint under a grant of the same made by T. M. Leavenworth, alcalde of the Pueblo of San Francisco, to one A. C. Harris, on the 23d day September, 1848, which was in the usual form of alcalde grants, and made in compliance with the then customary formalities.

The question of the validity of such a grant, and that it conferred the right to the possession upon the grantee, cannot be reconsidered by this court.

The 7th day of July, 1846, has been recognized by the courts and by the Congress of the United States as the date when the authority of the Mexican Departmental Official terminated in California. But in Cohas *vs.* Raisin, (3 Cal., 443,) it was held that a grant of a town lot made by an "American alcalde" in 1847 conveyed a title to the grantee, and the supreme court said: 40 "A grant of a lot in San Francisco, made by an alcalde, whether a Mexican or of any other nation, raises the presumption that the alcalde was a properly qualified officer; that he had authority to make the grant, and that the land was within the boundaries of the pueblo. It was further said, that such grants were not of any portion of the public domain made by officers of the conquering power, but were "grants of municipal lands made by the regularly authorized municipal authorities, under the laws, usages and customs of the country, which were not interfered with by the military or *de facto* government," etc. It is, indeed, true that the particular grant there present was a grant made before the treaty of peace; but there is nothing in the reasoning of the court in Cohas *vs.* Raisin, which would suggest that a different rule could be applied to a grant made after the actual overthrow of the Mexican authority, whether made before or after the treaty was signed and ratified. The court, in their opinion, add: "The fact that this right (of granting lots) was exercised by the municipality, in its different forms, *from* 1835 *to* 1850, without question or restriction would prove the usage and custom in the absence of the law." 41 If it should be admitted, as suggested—and we do not find it necessary to admit it—that the decision in Cohas *vs.* Raisin could be justified only by reason of the disturbed condition of land titles and threatened breaches of the peace, that very fact should induce us, after this lapse of time, to stand by the judicial solution of the question involved as *res adjudicata.*

The grant considered in Dewey *vs.* Lambier, (7 *Cal.*, 347,) was made by the officer who executed that under which the present plaintiff deraigns title, and was issued nearly two months *later*. In Dewey *vs.* Lambier the court said: "In the examination of this case we have observed the same line of defense, substantially, as that made in the case of Cohas *vs.* Raisin, and least it might be supposed that there is some disposition on the part of this court to question that decision, we take this occasion to approbate the same and to announce our determination of adhering to it."

Passing Hart *vs.* Burnett, and Payne *vs.* Treadwell, 15 and 16 *Cal.*, which recognize the cases previously referred to as authoritave. White *vs.* Moses, 21 *Cal.*, 34, is directly in point. 42 There the grant had been made in 1849. The case was decided in 1862, long after the *Van Ness Ordinance* had been ratified, and the court declared: "The law upon this point, whatever may be the opinions of individuals, or the determination of tribunals not governed by our judgments, must be considered settled so far as it depends upon the decisions of this court," and cited Cohas *vs.* Raisin, Dewey *vs.* Lambier, Welch *vs.* Sullivan, 8 *Cal.*, 179, and Payne *vs.* Dewey, 16 *Cal.*, 232. As late as 1871 it was said, in Broad *vs.* Broad, 40 *Cal.*, 496: "That an alcalde's grant passed a title to a grantee therein named, is beyond controversy in this court."

Nor (if it could be so overthrown) was the authority of the cases above cited overthrown by the Supreme Court of the United States in Alexander *vs.* Roulet, (13 *Wall.*, 386). The grant there held to be invalid was of a parcel of the common lands of the *pueblo*, and was made by Horace Hawes, *elected* and acting as *prefect of a district* which included the pueblo within its boundaries. The judgment of the circuit court of the United States for the district of California, which was affirmed by the Supreme Court, was to the 43 effect that, although each *prefect* of California while the same was a part of the Mexican territory, had power to make grants of the common and unappropriated lands of the *pueblos* within their jurisdiction; yet that from and after the conquest and acquisition of the country by the United States they ceased to have such power, and consequently the grant of the prefect Hawes was void.

The officers of the territory of California, (including prefects,) empowered by Mexican law to make grants of public lands, could grant lands within the pueblo, but the powers of such officers to make grants anywhere, ceased upon the conquest, and the power was not transferred to the military officers, or officers *de facto*, who immediately succeeded such department or territorial officers.

As we have seen, however, it has been determined by this court that a grant by an alcalde was not an ordinary grant of the public domain but a grant of *municipal* lands made by a regularly authorized municipal officer under the laws, usages, and customs of the country not interfered with by the United States or the *de facto* government which existed in California subsequent to the conquest and prior to the admission of the State into the Union. To 44 maintain this position it is not necessary to hold that the title or estate of the municipality was in any wise different from such as it was said to be in Hart *vs.* Burnett, *supra.*

Counsel for appellants seem to have misapprehended the effect of their citations from "Dwinelle's Colonial History of San Francisco." Governor Guiterrez, as there quoted, says: "The *Ayuntamiento*, (or Alcalde, see Hart *vs.* Burnett,) may dispose of these lands (the *ejidos*,) for building lots." "The *ejidos* could be alienated only for the purpose of granting *solares* or building lots," etc., (Dwinelle, p. 11.) The question, however, is not involved in the present case for two reasons: First, it does not appear that the lot described in the complaint constituted a portion of the ejidos; second, it is not a question which can be considered here in view of the *agreed case or stipulation* in the transcript.

The plaintiff being the absolute owner of the lands described in the complaint, they cannot be entered upon without her consent, nor can any portion of them be appropriated to the use of the public as a street, except upon due compensation paid or secured, and in pursuance of proceedings prosecuted for that purpose.

Judgment and order affirmed.

McKINSTRY, J.

We concur.
ROSS, J.
McKEE, J.

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the opinion of this court in Department No. 1, in the case of Jane Scott, respondent, *vs.* James S. Dyer and the City and County of San Francisco, appellants, No. 5909, as shown by the records of my office.

Witness my hand and seal of the court, this 30th day of September, A. D. 1880.

[SEAL.] FRANK W. GROSS, *Clerk.*

45 In the Supreme Court of the United States.

Undertaking on Appeal.

THE CITY AND COUNTY OF SAN FRANCISCO and J. S. DYER,
Plaintiffs in Error,
vs.
JANE SCOTT, Defendant in Error.

Know all men by these presents, that we, J. M. Wood and P. McG. McBean, both of the city and county of San Francisco, State of California, are held and firmly bound unto Jane Scott, defendant in error, in the above-entitled action, in the sum of five

hundred dollars lawful money of the United States of America, to be paid to the said Jane Scott, her executors or administrators. To the payment of which sum, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these
46 presents. Sealed with our seals. Dated this 2d day of September, A. D. 1880.

Whereas the above named, The City and County of San Francisco and J. S. Dyer, have prosecuted a writ of error to the Supreme Court of the United States of America, to reverse the judgment rendered by the supreme court of the State of California, in the cause herein above entitled—

Now therefore the condition of this obligation is such, that if the above-named, The City and County of San Francisco and J. S. Dyer, plaintiffs in error, shall prosecute their said writ of error to effect and answer all costs, if they fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

J. M. WOOD.
P. McG. McBEAN.

Signed, sealed, and delivered in presence of ———

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

J. M. Wood and P. McG. McBean, being duly sworn, each for himself, deposes and says that he is a householder in said city and county, and is worth the sum of five hundred dollars, exclu-
47 sive of property exempt from execution, and over and above all debts and liabilities.

J. M. WOOD.
P. McG. McBEAN.

Subscribed and sworn to before me, this 22d day of September, A. D. 1880.

R. F. MORRISON.
Chief Justice.

[Endorsed.]

Approved by me, this 22d day of Sept. 1880.

R. F. MORRISON,
Chief Justice.

Filed September 22d, 1880.

FRANK W. GROSS, *Clerk.*

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the undertaking on writ of error to the Supreme Court of the United States, in the case of The City and County of San Francisco and James S. Dyer, plaintiffs in error, *vs.*

Jane Scott, defendant in error, as shown by the records of my office.

Witness my hand and the seal of the court, this 30th day of September, A. D. 1880.

[SEAL.] FRANK W. GROSS, *Clerk.*

48 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said supreme court, before you, between the City and county of San Francisco and J. S. Dyer, plaintiffs in error, and Jane Scott, defendant in error, a manifest error hath happened to the great damage of the said plaintiffs in error, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court of the United States, in the city of Washington, District of Columbia, on the second Monday of October next, in the said United States Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 20th day of September, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth.

L. S. B. SAWYER,
Clerk U. S. Circuit Court Dist. Cal.

The above writ of error is hereby allowed.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

Endorsed: No. 5909. United States Supreme Court. ——— for the defendant in error. The City and County of San Francisco *et al.*, plaintiffs in error, *vs.* Jane Scott, defendant in error. Writ of error. Filed September 22, 1880. F. W. Gross, clerk. By J. B. Martin, deputy.

49 UNITED STATES OF AMERICA, *ss:*

To Jane Scott, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a

11-567

No..............

In the Supreme Court

OF THE

United States.

James S. Dyer and the City and
County of San Francisco,

Plaintiffs in Error.

vs.

Jane Scott,

Defendant in Error.

PLAINTIFFS' BRIEF.

WILLIAM CRAIG,

and J. A. [illegible] *Attorney for Plaintiffs in Error.*

SAN FRANCISCO:
P. E. DOUGHERTY & CO., PRINTERS, 412 COMMERCIAL STREET.
1884.

In the Supreme Court

OF THE

United States.

JAMES S. DYER AND THE CITY AND COUNTY OF SAN FRANCISCO,
Plaintiffs in Error.
vs.
JANE SCOTT,
Defendant in Error.

Brief of the Plaintiffs.'

Statement of the Case.

The material facts in this case are not disputed, and it was also agreed in the lower Court what were the precise questions of law presented for solution. These questions with the additional one of the jurisdiction of this Court are still the points in controversy.

In 1848, Thaddeus Leavenworth, Alcalde or Prefect of the Pueblo of San Francisco, (now a part of the State of California), made a grant to A. C. Harris, of a lot of land, 100 varas square, lying in said Pueblo. The premises in controversy are a portion of said lot, and the defendant in error deraigns title from said Harris.

The conquest of California was completed July 7th, 1846, as held by this Court in *Stearns* v. *U. S.* 6 *Wall.*, 590, and at the date of said grant the conquered territory had not been erected into a State.

In 1856, The City and County of San Francisco, within which said premises are situated, passed an ordinance adopting a certain map of said City and County, upon which a part of said premises are delineated as a public street, and said ordinance declared the same to be a street.

In 1858, The Legislature of California by Staute confirmed said ordinance and map, and likewise "confirmed" all Alcalde grants made after said conquest, *but subject to the plan of said map* and to the *location of the streets therein delineated.* (Stat., Cal., 1858, p. 52).

The United States in 1864, by Act of Congress, confirmed said ordinance and said Act of the Legislature of California (13 U. S. Stat. at Large, p. 332).

The defendant in error was in possession of the premises, and the plaintiffs in error, treating said premises as a public street, were proceeding to excavate and otherwise improve the same, when they were enjoined by the judgment now under review.

POINTS.

I.

This Court has Jurisdiction.

There are but two questions: *first*, did the Alcalde grant operate to vest the title which was then in the United States in Harris, and *second*, the decision of the lower Court having been to the effect that it did so operate, has this Court power to review.

We do not see how the jurisdiction can be controverted, but assuming that the point will be raised, we submit that the provisions of Rev. Stat. § 709, are applicable. The section prescribes that "a final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, * * * * or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority, may be re-examined and reversed, or affirmed in the Supreme Court upon a writ of error."

It was held in *Palmer* v. *Low*, 98 U. S. 1, that the title to these lands remained in the United States until July 1, 1864, when Congress confirmed the Van Ness ordinance and the Act of the Legislature above referred to, and granted the title to the persons therein described, (of whom Harris was himself one) subject to the public reservations therein contained.

That this state of facts comes within the provisions of the section conferring jurisdiction will appear from this consideration: namely, that the effect of the decision below is to hold that the

United States was divested of its title by the Alcalde grant to Harris.

The question at bar relates to the original disposition of the public lands. It also relates to the power of an officer assuming to act by authority of the United States, for at that time there was no other authority or power in the conquered territory. The Pueblo itself continued to exist only as a collection of inhabitants; it required legislative action to organize it as a governmental body.

Unquestionably at that time the United States could have abolished or rather ignored and discarded Pueblos entirely, saving of course all private rights, that is to say, protecting all valid Alcalde grants made under the Mexican rule. The United States treated the unparceled Pueblo lands as public land and occupied and still holds tracks of greater or less extent as military or other reservations.

The title to the unparceled Pueblo lands remained in the United States until through its Bounty or governmental policy it chose to part with it.

This question of jurisdiction may be summed up thus: Here are two persons each claiming to be a direct grantee of the United States, without any questions of trust between them. The one claiming title under a special Act of Congress, the other claiming that the United States had previously parted with title by the grant of some one claiming to act by authority of the United States.

It may not be amiss to remark upon the generosity with which the defendant in error and those in like case have been treated, Congress in the Act before referred to has validated all these otherwise void grants subject only to the preservation of the streets of the City.

II.

The Alcalde Grant was Void.

The Alcalde grant was void, in fact there was no Alcalde. *Alexander* v. *Roulet*, 13 *Wall.*, 386.

Harry I. Thornton
~~WILLIAM CRAIG, and~~
~~J. H. Meredith~~
Attorney for Plaintiff in Error.

111-768

No. ....

In the Supreme Court

Of the United States.

JAMES DYER and the
CITY AND COUNTY OF SAN FRANCISCO,
Plaintiffs in Error,

v.

Jane
~~JAMES~~ **SCOTT,**
Defendant in Error.

BRIEF OF DEFENDANT.

SIDNEY V. SMITH, JR.,
Attorney for Defendant in Error.

Filed this .... day of ...., A. D. 1884.

.... Clerk.

By .... Deputy Clerk.

Law Journal Print, W. T. Baggett & Co., 522 California St., S. F.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

JAMES DYER AND THE CITY AND COUNTY OF SAN FRANCISCO,
Plaintiffs in Error,
v.
JANE SCOTT,
Defendant in Error.

Brief of the Defendant.

STATEMENT OF FACTS.

Upon the 7th day of July, 1846, the Territory of Upper California was wrested from Mexico by the military forces of the United States. (6 Wall. 590.) From that date the country was under the military rule of the United States until the publication of the treaty of peace on the 4th day of July, 1848, which operated as a formal cession of California to the United States. After the treaty of peace, and until California was admitted into the Union in 1850, the general government of the country was merely a continuance of the military rule, a *de facto* government, the source of whose authority was the implied consent of the people.

Ryder *v.* Cohn, 37 Cal. 86.

Before and at the time of the conquest in 1846 the municipality or pueblo of Yerba Buena, now San Francisco, possessed a local government in the form common to Mexican towns, and after the conquest and until the organization of the State in 1850, this local government continued in force and operation, its offices being filled by Americans elected by the people.

Under the Mexican law every pueblo held in trust for its inhabitants a certain quantity of common land, which the Alcalde, the chief executive officer, was empowered to grant to actual settlers for the purpose of residence. (Merryman *v.* Bourne, 9 Wall. 601.) Such grants of town lots in San Francisco had been made by Alcaldes prior to the conquest. After the conquest and until the organization of the State, American Alcaldes continued to make such grants, most of which were made with reference to certain maps or plans of the town adopted shortly after the American occupation, on which maps or plans the then town site was regularly laid off into blocks and lots divided by streets.

A survey called the Laguna survey was also made of a tract within the limits of the pueblo lands, but beyond the limits of the maps or plans above referred to, dividing the tract surveyed into twenty-six lots lying in one body, without reservation of any streets, and in no way connected with the street system of the said maps or plans, and grants of those Laguna survey lots were made by American Alcades, under one of which, made in 1848, the defendant in error claims the title which is in question in this action. The defendant in error and those under whom she claims have been in actual possession of her land since the date of said grant, claiming to own the same in fee simple by virtue thereof.

By an ordinance passed in 1855, known as the Van Ness Ordinance, the city of San Francisco undertook to confirm the title of all lands within her corporate limits to the parties who were in the actual possession thereof on the 1st day of January, 1855, reserving to herself, however, the right to lay out and open streets over such of said lands as lay outside of the limits of the maps first above mentioned.

In 1856 the city of San Francisco adopted a map of part of the pueblo lands lying beyond the limits of the city maps before referred to, and including the Laguna survey, by which the street system of the earlier maps was for the first time so extended as to run over the Laguna survey.

The said ordinance and the said plan or map adopted in 1856 were ratified by Act of the Legislature of California, passed March 11th, 1858. (Satutes of 1858, p. 52.)

By Act of Congress of July 1st, 1864 (13 U. S. Stats. at Large, p. 332), the United States relinquished and granted all its right and title to the lands within the corporate limits of San Francisco to the city for the uses and purposes specified in said ordinance, provided that such relinquishment and grant should in no manner interfere with or prejudice any *bona-fide* claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States.

The foregoing statement will perhaps be rendered more clear by reference to the annexed photographic copy of the official map of the city as it was in 1851, three years later than the grant under which we claim. The Laguna survey is seen lying beyond the limits of the street system. The map of 1856 was an extension of the street system, shown by this map, over the region lying about and beyond the Laguna survey.

The city of San Francisco has never condemned any portion of the land included in the Laguna survey for the purposes of the streets laid down on the map prepared in obedience to said ordinance, or compensated the owners of the Laguna survey lots in any way for such use, and the defendant in error has always resisted the opening of any such streets through her property. No attempt was ever made on the part of the city to open any such street, prior to the attempt to open and grade Green street, as set forth in the complaint. This action was brought by defendant in error to enjoin the city from opening and grading Green street over her land, and she obtained judgment in the trial Court in her favor.

That judgment was affirmed on appeal to the Supreme Court of the State (Scott *v.* Dyer, 54 Cal. p. 430), and from the latter judgment the city now appeals by error to this Court.

The principal question presented to the Court may be thus stated:

If the title to lots in the Laguna survey is derived from the city of San Francisco under the ordinance granting the title of the city to persons in possession January 1st, 1855, or if it comes from the State by reason of the grant contained in the act confirming that ordinance, or if it proceeds from the United States by virtue of the act of July 1, 1864, in any or all of these cases the defendant in error cannot resist the opening of the street, as each and every of those grants was accompanied by a reservation of the street. If, however, the title to the land was vested in the grantee of the Alcalde in 1848, before the passage of the ordinance or the statutes, and was a complete, indefeasible title, which might be confirmed but could not be impaired by city or State or Federal Government, then the attempted ratifications were nullities, the marking of streets on a map, as far as these lands were concerned, an empty act, and the judgment of the State Courts enjoining the opening of the street must be affirmed.

I.

There is no Federal question involved in this case.

Before proceeding to the discussion of the question, we suggest that the writ of error should be dismissed on the ground that the question is not of a Federal nature.

The validity of no treaty or statute of the United States is drawn in question.

There has been no decision against any right or title claimed under any such treaty or statute.

The only ground upon which it can be plausibly suggested that the case presents a Federal question is that the decision of the State Court was a decision against the title claimed by the city and county of San Francisco, and that inasmuch as the city claims under the treaty with Mexico and sundry acts of Congress, the decision of the State Court was a decision against a title set up under a treaty and statute of the United States, within the meaning of section 709 of the Revised Statutes.

But it has been held that it is not merely the fact that one of the parties to a suit claims title under a treaty or statute of the United States, and that the decision has been against the party so claiming, which raises a Federal question. The decision must have involved a construction of the treaty or statute, or a rejection of the claim of title on the ground that the treaty or statute was inoperative to create it.

This position results from the evident intention of the law, which was to vest in the tribunals of the United States the ultimate construction of the national legislation, and from the limitation upon the judicial power of the United States (U. S. Constitution, Art. III, Section 2), "to all cases in law and equity, arising *under* this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

In Carpenter *v.* Williams, 9 Wall. 785, the Court said: 'We are of opinion that the record presents no case for the jurisdiction of this Court. * * * It involves the construction of no Act of Congress. The decison of the Court below denies the validity of no Act under the authority of the United States. It recognizes to its fullest extent the title confirmed by the Act of Congress, and the Act of confirmation, and only determines to whom that confirmation was made.

"It is a mistake to suppose that every suit for real estate, in which the parties claiming under the Federal Government are at issue as to which of them is entitled to the benefit of that title, necessarily raises a question of Federal cognizance. If this were so, the title to all the vast domain, once vested in the United States, could be brought from the State Courts to this tribunal. In the case before us, the rules which must determine the question at issue are common-law rules, and the result cannot be varied by the application of any principle of Federal law or Federal authority."

It will be observed that the reason why the issue in the case at bar does not involve the construction of the treaty and statutes under which the city claims, is that the defendant in error does not dispute the title which the city derives from those sources, or draw in question the character of that title: The defendant in error claims to hold *under* the city; she claims to be the grantee of the city; to be the owner of the city title—a title not paramount to, but derived from it.

That the grantee of an Alcalde holds under and not adversely to the city was well illustrated in Lynch *v.* Bernal, 9 Wall. 322, where the question was whether the Bernals, who had obtained a grant of land within the limits of the Pueblo from a Mexican Governor, had a right to present their claim to the Board of Land Commissioners therefor, or whether their claim should not have been presented in the name of the corporate authorities of the city, under the fourteenth section of the Act of Congress of March 3, 1851 (9 Stats. at Large, p. 634), which provided that claims for lots held under grants from any town to which land might have been granted by the Spanish or Mexican Government, should be presented by the corporate authorities of said town, and where the Court held that, "the claim of the Bernals not being derived from the Pueblo of San Francisco, or by any action of its authorities but directly by grant from the political chief of the department, was adverse to the claim of the city. It was, therefore, properly presented to the Board of Commissioners." The converse of that proposition is, that if the claims of the Bernals had been derived from any action of the authorities of the pueblo, it would not have been adverse to the claim of the city.

When there is no dispute as to the character of the title derived under the treaties and statutes of the United States, and the only question is whether the original grantee has parted with his title, or in whom, of two claimants, the title has become vested, it has been repeatedly held that there is no Federal question presented.

Thus, in Shaffar *v.* Scudday, 19 How. 21, the Court said: "The plaintiff in error admits the title of the State, and claims under a patent granted by the State. Now, whether this patent conveyed to him a title or not, depended altogether upon the laws of Louisiana, and not upon the acts of Congress, or the acts of any of the officers or authorities of the general Government. It was a question, therefore, for the State Courts. And the Supreme Court of the State have decided that this patent could convey no right to the land in question, because the State had parted with its title by a patent previously granted to Scudday, the defendant in error. The right claimed by the plaintiff in error, which was denied to him by the State Court, did not, therefore, depend upon any Act of Congress, or the validity of any authority exercised under the United States, but exclusively upon the laws of Louisiana. And the Supreme Court of the State have decided that, according to these laws, he had no title, and that the land in question belonged to the grantee of the elder patent. We have no authority to revise that judgment by writ of error."

In Romie *v.* Casanova, 1 Otto, 379, the defendant claimed title by virtue of an Alcalde grant of a lot in San Jose, in 1845. The plaintiff claimed under Alcalde grants of 1847 (45 Cal. 131). The determination of this Court having been in favor of the defendant, the case was taken to the Supreme Court of the United States, which gave its judgment as follows:

"No Federal question is presented by the record in this case. The action was brought to recover the possession of certain lands. Both parties claimed title from the city of San Jose; and the question to be determined was, which of the two had actually obtained a grant of the particular premises in controversy. The title of the city was not drawn in question. *Even if it depended upon the treaty of Guadalupe Hidalgo, and the several acts of Congress to ascertain and settle private land claims in California*, the case would not be different. Both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it."

So also in McStay *v.* Friedman, 2 Otto, 723, the Court said:

"No Federal question was involved in the decision of the Supreme Court. The city title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error; and this did not depend upon the 'Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States.' The case is therefore, in all essential particulars, like that of Romie *v.* Casanova, 91 U. S. 379, and the writ must be dismissed for want of prosecution."

To repeat, we claim under the 8th article of the treaty of Guadalupe Hidalgo which guaranteed the validity of all titles to land theretofore vested under Mexican law, and so the title of the pueblo to its land; we claim under the Act of Congress, which confirmed the pueblo title and defined the trust under which it was held; we claim that we are the grantee of the pueblo by virtue of the power of alienation vested in its officers. The latter claim we now proceed to examine more closely.

II.

The grant of an American Alcalde conferred an indefeasible title.

In Woodworth *v.* Fultón, 1 Cal. 295, the Supreme Court of the State held that the land of the pueblo of Yerba Buena was part of the public domain and as such vested in the United States upon the conquest; that an American Alcalde grant of any part of it was void; and that the title to a pueblo lot could only be derived from the United States.

But this case and its doctrine were overruled by the same Court in the subsequent case of Cohas *v.* Raisin, 3 Cal. 443, in which it was decided that the pueblo lands were not any portion of the public domain but were "municipal lands;" that the American Alcalde grants were "grants of municipal lands, made by the regular authorized municipal authorities, under the laws, usages and customs of the country, which were not changed or interfered with by the military or *de facto* government organized under the laws of war."

The law as laid down in Cohas *v.* Raisin has been affirmed by all the subsequent decisions touching the question, and became a rule of property in the State in regard to all Alcalde grants made between the conquest and the organization of the State government.

Dewey *v.* Lambier, 7 Cal. 347.
Hart *v.* Burnett, 15 Cal. 530.
Payne *v.* Treadwell, 16 Cal. 223.
White *v.* Moses, 21 Cal. 34.
Broad *v.* Broad, 40 Cal. 493.
Scott *v.* Dyer, 54 Cal. 430.

In Hart *v.* Burnett the affirmance of the doctrine of Cohas *v.* Raisin was based upon the rule of international law, that the conquest of a country, accompanied by a transfer and cession of the conquered territory to the conqueror, effects merely a transfer of sovereignty, and leaves unaltered the rights of private property, the constitution and privileges of municipalities, and the duties and powers of municipal officers.

The principle of these cases has been fully recognized and affirmed by this Court in

Merryman *v.* Bourne, 9 Wall. 601,

where the Court uses this language:

" The conquest of California by the armies of the United States is regarded as having become complete on the 7th day of July, 1846. On that day the government of the United States succeeded to the rights and authority of the government of Mexico. The dominion of the latter sovereignty was then finally displaced, and succeeded by that of the former. Before that time, the pueblo or village of San Francisco existed, and under the laws of the country was entitled to the territory within certain prescribed limits, known as pueblo lands. It had also an ayuntamiento or town council and an alcalde. The alcalde was the chief executive officer of the pueblo, and, as such, had authority to make grants of the pueblo lands. The exercise of this function was subject to the authority lodged in the ayuntamiento, and to the still higher authority of the departmental governor and assembly.

"In the case of Woodworth *v.* Fulton, it was held by the Supreme Court of the State that from the time of the conquest, these pueblo lands, so far as they had not been granted to individuals, became a part of the public domain of the United States, and, as such, subject to the exclusive control and disposition of Congress. This doctrine was subsequently overruled in the case of Cohas *v.* Rasin. It was there held that the conquest had no such effect, but that the lands continued to be the public property of the municipality as before the war; and that the laws of Mexico relating to the subject continued in force until changed by the legislative authority of the State. It was further held that an alcalde grant, made after the conquest, was to be presumed valid, and was competent to convey title.

"These doctrines are now firmly established as a part of the rules of property of the State."

It would seem as if this language should have put the question we are now discussing beyond dispute, but in the face of it counsel for plaintiffs in error, on page 5 of their brief, say:

"The question at bar relates to the original disposition of the *public* lands.

"It also relates to the power of an officer assuming to act by authority of the United States, for at that time there was no other authority or power in the conquered territory. The pueblo itself continued to exist only as a collection of inhabitants; it required legislative action to organize it as a governmental body."

But counsel point to the language of this Court in Palmer *v.* Low, 98 U. S. p. 16, as authority for the position that the title to the pueblo lands remained in the United States until the Act of July 1st, 1864. That language is as follows:

"The nature of the title of San Francisco to her pueblo lands has often been the subject of consideration in this Court, and was carefully stated by Mr. Justice Field in Townsend *v.* Greeley, 5 Wall. 326, and Grisar *v.* McDowell, 6 Id. 363. At the time of the conquest the pueblo, of which the city of San Francisco became the successor, did not have an indefeasible estate in the unconveyed portion of these lands, but only a limited right of disposition and use, subject in all particulars to the control of the government of the country. 'It was a right which the government might refuse to recognize at all, or might recognize in a qualified form' (6 Wall. 373). Upon the conquest, the United States succeeded to the rights and authority of the Mexican government, subject only to their obligations under the treaty of Guadalupe Hidalgo. As before that time the fee had not passed out of the government of Mexico, it was transferred to the United States by the conquest and the treaty which followed. Before, therefore, the estate of the pueblo could become absolute and indefeasible some action was required on the part of the United States. It is conceded that this action was not taken until the Act of July 1st, 1864. Down to that time the city held under its original imperfect Mexican title only. Afterwards it was possessed of the fee for the uses and purposes specified in the Van Ness Ordinance."

But we need hardly point out that the discussion in Palmer *v.* Low, Townsend *v.* Greeley and Grisar *v.* McDowell was as to the nature of the title of the pueblo to her lands, and not as to the title of her grantee to his land. The pueblo title was a very indefinite thing, both as to the land which it included and as to its own nature. No particular body of land was ever specifically assigned to the pueblo by the Mexican government, and the character of the title, whether legal or equitable, with the nature of the trust attached to it, was never defined. Under those circumstances, it was held in the cases above cited, that the pueblo title needed to be confirmed by the United States as the successor of Mexico, its limits marked out, its purposes expressed. Until this was done, it was only a revocable title, revocable at the will of the Mexican government, or the successor of that government.

But these considerations do not apply to the title of the person in whose favor an officer of the pueblo had exercised the power of alienation vested in him. "The purpose to be accomplished by the creation of the pueblos did not require their possession of the fee. The interest, as we had occasion to observe in the case already cited, amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands or a source of revenue, or for other public purposes."

Grisar *v.* McDowell, 6 Wall. 373.

It is not the interest of the pueblo itself with which we have to do in this case, but her power of alienation and the title which passed under it. The right to grant lots in severalty was a power which needed not for its efficiency to be accompanied by any interest all. It was a revocable power, but whenever exercised by a proper officer and in accordance with law, the title thereby created was perfect and indefeasible—"*en plena propriedad.*" (15 Cal. 555.)

The title of the grantee of the pueblo needed, perhaps, some confirmation by the general Government of the United States. It was necessary for its perfection that the Government should acknowledge that San Francisco was a pueblo, and should define the boundaries of its territory, but when those two facts were determined the general Goverment exhausted its right of ratification. The United States might at any time after the conquest have revoked the power of alienation vested in the pueblo and its officers; it might have refused to allow the claim of the city for its title to unalienated and undistributed lands, or could at least accompany its allowance with considerable qualification. But as to lands vested in individual ownership through the action of the pueblo officers, the confirmation of the Government could not be withheld, and could not be coupled with any limitation or derogation of the perfect title already vested.

Speaking of the effect of the act of July 1, 1864, upon an alcalde grant, this Court said in

Merryman *v.* Bourne, 9 Wall. 603: "It is by no means clear that the act was necessary to the completeness and validity of the title in question. The later adjudications referred to, made before the passage of the act, held by necessary implication that it was not." In this case the act in question is spoken of as a "further confirmation" of the alcalde title which operated in the same way as the Van Ness ordinance and the act of the Legislature.

It is evident, therefore, that the confirmation on the part of the United States of the pueblo title was of a twofold nature. As to the undefined title of the city to her ungranted lands, it was a confirmation springing from the holder of the fee, which could be limited to any extent. As to those lots which had already been granted in severalty and the fee of which had vested in the grantees, it was a mere acknowledgment of the existence of the pueblo and of the extent of her boundaries.

As to these lots, the right of formal confirmation was the only right remaining in the United States, and therefore the broad language of the act of 1864, granting to the city all the right and title of the United States to the land within her corporate limits for the uses and purposes specified in the Van Ness Ordinance, cannot be taken as an attempt to destroy a title already vested, to carve streets out of land already owned in fee.

As we have said, the decision in the case of Merryman *v.* Bourne, 9 Wall. 592, would seem to settle the law as we have stated it, and, so it would, without doubt, were it not for the confusion created by the more recent case of Alexander *v.* Roulet, 13 Wall. 386, upon which the plaintiffs in error rely for a reversal of the judgment in this case.

Alexander *v.* Roulet involved the question of the power of an American, acting in 1850 as Prefect of the Territorial District which included the Pueblo of San Francisco, to make a valid grant of pueblo land.

The Circuit Court had held that the conquest destroyed the authority of Territorial officers to make grants of pueblo land, and this Court, in affirming the judgment, might well have put its decision upon the same ground. For it is evident that while the authority of *municipal* officers of Mexican towns survived the war, in accordance with the principles of international law above adverted to, the cession of political sovereignty from Mexico to the United States put an end to the power of Mexican territorial officers, and that the military officers who succeeded them in the *de facto* territorial government which the circumstances rendered necessary, had no right to interfere in the conduct of municipal affairs.

Scott *v.* Dyer, 54 Cal. 434.

But this Court, instead of confining itself to a discussion of the right of a Prefect to dispose of public land, considered, as we think, in a most unsatisfactory manner, the nature of the pueblo title itself, and the result was a series of remarks, which, we respectfully submit, are without authority, because they are *dictum*, and because they are not in harmony with the former decisions of this Court.

An analysis of this case shows that, in order to reach its conclusion, the Court considered, or rather stated:

1. The consequence of the conquest upon the authority of Mexican officials.

2. The consequence of the conquest upon the title to land.

3. The nature of the title of the pueblo to its lands.

These questions were the only ones alluded to.

"By the conquest of the country," says the Court, "Mexican rule was displaced, and with it the authority of the Mexican officials to alienate the public domain."

Thus, in twenty-four words, the whole matter is disposed of. The important and obvious distinction between the officials of the Mexican General Government and the officials of the municipality is ignored. The principles of international law so ably commented upon by Judge Baldwin in Hart *v.* Burnett, 15 Cal. 559, are ignored.

This treatment of the subject is closely connected with, indeed caused by, another error which the Court has fallen into; that of considering the Pueblo land as part of the "public domain."

"By the conquest of the country, Mexican rule was displaced, and with it the authority of Mexican officials to alienate the *public domain*, and as a necessary consequence of this conquest, the constitution of the United States, which gives to Congress the disposition of the public lands, was extended over the territory of California."

The argument is, the land included in the Pueblo was public land, part of the public domain; as such, the authority of the Mexican officials over it ceased with the conquest, and as such it passed to the United States, and became subject to the disposition of Congress. But the major premise of this reasoning had already been more than once denied in the Supreme Court of the United States.

"The treaty of Guadalupe Hidalgo does *not* purport to divest the pueblo existing at the site of the city of San Francisco, of any rights of property, or to alter the character of the interest it may have held in any lands under the former government. It provides for the protection of the rights of the inhabitants of the ceded country to their property; *and there is nothing in any of its clauses inducing the inference that any distinction was to be made with reference to the property claimed by* *towns under the Mexican Government.* The subsequent legislation of Congress does not favor any such supposition, for it has treated the claims of such towns as entitled to the same protection as the claims of individuals, and has authorized their presentation to the Board of Commissioners for confirmation."

Towsend *v.* Greely, 5 Wall. 334.

What is this but the position contended for in Hart *v.* Burnett: that the pueblo had a title, that it was not impaired by the cession, that it was saved by the treaty and acknowledged by the Act of 1851, and that the city to-day "stands on this title, not as a title granted by the Federal Government, but as a title *acknowledged* by that Government?" (15 Cal. 577.)

So in Grisar *v.* McDowell, 6 Wall. 372. "It muts be conceded, also, that the pueblo, which thus existed, possessed some claim, legal or equitable, to, or some interest in lands within the limits of four square leagues, to be assigned and measured off from the northern portion of the peninsula, upon which the city of San Francisco is situated, and that the city has succeeded to such claim or interest. *This has been held by the Supreme Court of the State after the most elaborate and extended consideration.* But what is of more consequence, and is *conclusive upon this Court*, it has been so adjudged by the Circuit Court of the United States, and that adjudication has been made final, as we shall hereafter see, by the legislation of Congress, and the dismissal of the appeal to this Court, which followed that legislation."

That the ungranted land of the pueblo became at the conquest part of the public domain of the United States, was the very point of the decision in Woodworth *v.* Fulton, which decision was rejected as law by Merryman *v.* Bourne, 9 Wall. 602.

The opinion which we are reviewing next alludes to the indefinite character of the pueblo title, and cites Townsend *v.* Greeley to that effect. But it will be seen that this was to introduce at once an element of confusion, for it was not the *title of the pueblo to its lands* which was before the Court, but the title of the *grantee* of the pueblo under the right of alienation which existed in the pueblo.

An inquiry, therefore, into the nature of the pueblo title can throw no light upon the nature of the title of the pueblo's grantee. For the ascertainment of the latter it is only requisite to examine into the power of the pueblo, or its officers, to make grants, and then into the effect of the cession upon that power. It is illogical to argue that, because the title of the pueblo to its lands was indefinite and needed confirmation by the government, therefore, the title of the person, in whose favor the pueblo had exercised its power of alienation was also indefinite and needed like confirmation.

But the Court, learning from Townsend *v.* Greeley that this power of alienation "was in all particulars subject to the control of the government of the country," concludes that, "manifestly, if this right of disposition and use was subject to Mexican control while Mexican rule prevailed, it was equally subject to the control of our government when this rule was changed."

What exact bearing upon the discussion this conclusion is meant to have, we can only surmise, for the statement is carried no further, and is followed by a reiteration of the necessity of legislative action to confirm the pueblo title.

Now nothing can be more clear than that the right of the government to control the exercise of the power of disposition, and the right of the government to confirm the pueblo title, are totally distinct. They are as distinct as the power of the pueblo to convey, and the nature of its title. But the mention of the two things in one breath shows that, in the mind of the Court, they are united by what we cannot otherwise describe than a confusion of ideas.

If by this reference to the right of the government to control the power of disposition vested in the pueblo, it is meant that the exercise of the power on the part of the pueblo was of no effect until confirmed by the government, it requires but a few words to show the fallacy of the suggestion.

The statement is, that the United States succeeded to the rights and occupied the position of Mexico. But the right of Mexico to interfere with the power of alienation has never been held to invalidate grants made before the conquest; why should the same right in the United States invalidate grants made after the conquest? The case, both before and after the conquest, was one of a revocable power, which could be withdrawn at any moment, but was effectual to its full extent until revoked.

To sum up our criticism of this opinion: It is in conflict with Merryman *v.* Bourne, which followed Cohas *v.* Raisin, and obeyed the rule of property of the State.

It violates established principles of public law.

It confounds the distinction between the officers of the pueblo and those of the general government.

It confounds the distinction between the pueblo land and the public land, which had been fully recognized in Townsend *v.* Greeley and Grisar *v.* McDowell.

It confounds the distinction between the title of the pueblo to its land and the title of the grantee of the pueblo to his land.

It confounds the distinction between the right of the government to revoke the power of alienation and the power of the government to confirm the pueblo title.

It confounds the distinction between the liability of a power to be revoked, and its effectiveness until revoked.

And all this it does without reference to the opposite opinions of this Court, or discussion of one of the important principles of law involved in the case.

The facts of the case at bar present the position of the city attempting to retake property which she has already granted away by the authorized act of her own officers, and of offering as an excuse for her conduct the title which she derives from the United States.

Under the most elementary principles of law, she is estopped from setting up a new right to defeat her own grant, and whatever title she got from the United States must inure to the benefit of her grantees.

Either for this reason, or because our claim, being under and not in opposition to her title, raises no Federal question, we submit that the judgment of the State Court should be affirmed.

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